

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of the Applications of	)	
	)	
HISPANIC INFORMATION AND	)	
TELECOMMUNICATIONS NETWORK, INC.	)	File No. BPIF-19951016BR
	)	
For a New Educational Broadband Service Station	)	
on the A Group Channels at Anderson, Indiana	)	
	)	
and	)	
	)	
HISPANIC INFORMATION AND	)	
TELECOMMUNICATIONS NETWORK, INC.	)	File No. BPLIF-951016BM
	)	
For a New Educational Broadband Service Station	)	
on the C Group Channels at Indianapolis, Indiana	)	
	)	
and	)	
	)	
BALL STATE UNIVERSITY	)	File No. BPLIF-951020RH
	)	
For a New Educational Broadband Service Station	)	
on the A Group Channels at Anderson, Indiana	)	
	)	
and	)	
	)	
	)	
BALL STATE UNIVERSITY	)	File No. BPLIF-951020HU
	)	
For a New Educational Broadband Service Station	)	
on the B Group Channels at Kokomo, Indiana	)	
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**MEMORANDUM OPINION AND ORDER**

**Adopted: March 2, 2005**

**Released: March 9, 2005**

By the Commission:

## I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we consider an application for review filed by Hispanic Information and Telecommunication Network, Inc. (HITN).<sup>1</sup> HITN seeks Commission review of a *Memorandum Opinion and Order* by the former Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Division).<sup>2</sup> The *Division Order* denied HITN's petitions for reconsideration of the dismissal of HITN's applications for new Educational Broadband Service (EBS)<sup>3</sup> stations at Anderson and Indianapolis, Indiana.<sup>4</sup> It also dismissed a related petition to deny filed by HITN against the captioned application filed by Ball State University (Ball State) for a new EBS station at Kokomo, Indiana,<sup>5</sup> and denied a petition to stay filed by HITN seeking a stay of the grant of Ball State's application for a new EBS station at Anderson, Indiana.<sup>6</sup> We also address HITN's petition for reconsideration of the grant of Ball State's Kokomo application.<sup>7</sup> For the reasons stated below, we deny the AFR and the Kokomo PFR.

## II. BACKGROUND

2. On February 25, 1993, the Commission imposed a freeze on the acceptance of new and major change ITFS applications.<sup>8</sup> As an exception to that freeze, however, the Commission stated that it would continue to accept (but not process) applications in which the applicant relies on NTIA for construction funds because NTIA required applicants to file applications with the Commission before seeking funding.<sup>9</sup> The Commission stated that such applications would be cut off as of the end of the first filing window.<sup>10</sup>

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<sup>1</sup> Application for Review and Request for Stay (filed Dec. 15, 2003) (AFR).

<sup>2</sup> Hispanic Information and Telecommunications Network, *et al.*, *Memorandum Opinion and Order*, 18 FCC Rcd 23872 (WTB PSPWD 2003) (*Division Order*).

<sup>3</sup> On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O & FNPRM*). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Because the new rules are now in effect, we will refer to these services by their new names when referring to these services in the present tense. Where we are referring to past actions or past rules, we will refer to the services by their old names.

<sup>4</sup> *Id.*, 18 FCC Rcd at 23876-79 ¶¶ 11-18.

<sup>5</sup> *Id.*, 18 FCC Rcd at 23879 ¶ 19.

<sup>6</sup> *Id.*, 18 FCC Rcd at 23879 ¶ 20. Request for Stay (filed Feb. 3, 1999) (Stay Request).

<sup>7</sup> Request for Rescission of ITFS Grant, or Alternatively, Petition for Reconsideration (filed Mar. 5, 2004) (Kokomo PFR).

<sup>8</sup> Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Notice of Proposed Rulemaking*, 8 FCC Rcd 1275, 1277 ¶ 9 (1993).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

3. On May 12, 1994, HITN submitted an application for a new ITFS station on the A Group channels at Anderson, Indiana.<sup>11</sup> HITN filed this application pursuant to the exception for applications that relied on NTIA funding.<sup>12</sup> On May 12, 1994, HITN submitted an application for a new ITFS station on the C Group channels at Indianapolis, Indiana pursuant to the same exception.<sup>13</sup>

4. On June 9, 1994, the Commission partially lifted the freeze to allow major change applications to be filed with respect to existing facilities.<sup>14</sup> On February 7, 1995, the Commission instituted a filing window system for new and major change ITFS applications.<sup>15</sup> The Commission stated, “Until the effective date of this order, we will continue the present filing restrictions in effect and accept applications for major changes to existing ITFS facilities and applications relying on NTIA funding.”<sup>16</sup> The order became effective after May 25, 1995.<sup>17</sup>

5. On May 23, 1995, Ball State filed an application to make major changes to ITFS Station WBX257, Indianapolis, Indiana.<sup>18</sup> That application was accepted for filing on September 29, 1996.<sup>19</sup> No petitions to deny or objections were filed against the application. The application was granted on October 14, 1997.<sup>20</sup> No party filed a petition for reconsideration of the grant of that application.

6. The Commission opened a filing window for new ITFS stations from October 16, 1995 to October 20, 1995.<sup>21</sup> On October 20, 1995, Ball State filed an application for new ITFS stations on the A channel group at Anderson, Indiana.<sup>22</sup> Based upon our engineering analysis, Ball State’s application was mutually exclusive with HITN’s application for the A Group channels at Anderson, Indiana. On the same date, Ball State filed an application for a new ITFS Station on the B Group channels at Kokomo, Indiana.<sup>23</sup> Based upon our engineering analysis, that application was mutually exclusive with HITN’s applications for the A Group channels at Anderson and the C Group channels at Indianapolis.

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<sup>11</sup> File No. BPLIF-951016BR (Anderson Application).

<sup>12</sup> See Letter from Benjamin Perez, Esq. to William Caton, Acting Secretary, Federal Communications Commission (filed May 12, 1994).

<sup>13</sup> File No. BPIF-951016BM (Indianapolis Application).

<sup>14</sup> Amendment of Part 74 of the Commission’s Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 3348, 3354 ¶ 43 (1994).

<sup>15</sup> Amendment of Part 74 of the Commission’s Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd 2907 (1995).

<sup>16</sup> *Id.* at 2922 n.129.

<sup>17</sup> The *Report and Order* was published in the Federal Register on April 25, 1995 (60 Fed. Reg. 20241). The Federal Register summary stated that the effective date would be “[u]pon approval of the Office of Management and Budget of a modified FCC Form 330 to effectuate the modifications approved in this Report and Order.”

<sup>18</sup> File No. BMPLIF-950523DB (Station WBX257 Major Change Application).

<sup>19</sup> New and Major Change ITFS Applications Accepted for Filing, *Public Notice*, Report No. 44096 (rel. Oct. 14, 1997).

<sup>20</sup> Broadcast Actions, *Public Notice*, Report No. 44096 (rel. Oct. 14, 1997).

<sup>21</sup> See Notice of Instructional Television Fixed Service Filing Window from October 16, 1995, through October 20, 1995, *Public Notice*, Report No. 23565A (rel. Aug. 4, 1995).

<sup>22</sup> File No. BPLIF-951020RH (Ball State Anderson Application).

<sup>23</sup> File No. BPLIF-951020HU (Kokomo Application).

7. On November 20, 1997, HITN's Indianapolis application was dismissed because HITN's receive sites were predicted to receive unacceptable levels of adjacent channel interference from Stations WHR808, Indianapolis, Indiana and WFD456, Franklin, Indiana.<sup>24</sup> On December 24, 1997, HITN filed a petition for reconsideration in which it argued that it would employ equipment that would allow successful reception at its receive sites.<sup>25</sup> On December 18, 1998, the Chief of the former Video Services Division, Mass Media Bureau (Division) denied HITN's First Indianapolis Petition.<sup>26</sup> The Division concluded that HITN had failed to establish its eligibility because none of its receive sites would receive a usable signal.<sup>27</sup> The Division also rejected HITN's attempt to use an alternative method to compute adjacent channel interference to its proposed facility.<sup>28</sup> HITN filed a petition for further reconsideration on January 19, 1999.<sup>29</sup>

8. On June 30, 1998, HITN's Anderson Application was dismissed because HITN's receive sites were predicted to receive unacceptable levels of adjacent channel interference from Station WBX257, as modified by the Station WBX257 Major Change Application.<sup>30</sup> On August 14, 1998, HITN filed a petition for reconsideration contending that it was improper for the Division's Distribution Services Branch to consider Station WBX257 as modified by the Station WBX257 Major Change Application in evaluating HITN's application.<sup>31</sup> On November 30, 1998, the Division denied HITN's First Anderson Petition.<sup>32</sup> The Division concluded that HITN had failed to establish its eligibility because none of its receive sites would receive a usable signal.<sup>33</sup> HITN filed a petition for further reconsideration on December 30, 1998.<sup>34</sup>

9. Ball State's Kokomo application was accepted for filing on August 21, 1998.<sup>35</sup> HITN filed a petition to deny that application on September 21, 1998.<sup>36</sup> HITN stated in its Petition to Deny Ball's application, that HITN's Anderson and Indianapolis Applications would be mutually exclusive

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<sup>24</sup> See Letter from Clay Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Jose Luis Rodriguez, President, Hispanic Information and Telecommunications Network, Inc. (dated Nov. 20, 1997).

<sup>25</sup> Petition for Reconsideration (filed Dec. 24, 1997) (First Indianapolis Petition).

<sup>26</sup> See Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau to Jose Luis Rodriguez, President, Hispanic Information and Telecommunications Network, Inc. (dated Dec. 18, 1998).

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 1.

<sup>29</sup> See Petition for Reconsideration And, Alternatively, Application for Review, File No. BPLIF-951016BM (filed Jan. 19, 1999) (Second Indianapolis Petition).

<sup>30</sup> See Letter from Clay Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Jose Luis Rodriguez, President, Hispanic Information and Telecommunications Network, Inc. (dated Jun. 30, 1998).

<sup>31</sup> Petition for Reconsideration (filed Jul. 30, 1998) (First Anderson Petition).

<sup>32</sup> See Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau to Jose Luis Rodriguez, President, Hispanic Information and Telecommunications Network, Inc. (dated Dec. 18, 1998).

<sup>33</sup> *Id.* at 2.

<sup>34</sup> See Petition for Reconsideration And, Alternatively, Application for Review, File No. BPLIF-951016BR (filed Dec. 30, 1998) (Second Anderson Petition).

<sup>35</sup> Broadcast Applications Accepted for Filing, *Public Notice*, Report No. 24313A (rel. Aug. 26, 1998).

<sup>36</sup> Petition to Deny (filed Sep. 21, 1998) (Kokomo Petition).

with Ball State's Kokomo Application.<sup>37</sup> HITN references its pending petitions for reconsideration and argues that because of its pending petitions for reconsideration, it was error to accept the Kokomo Application for filing.<sup>38</sup>

10. On August 24, 1998, Ball State's Anderson Application was granted.<sup>39</sup> On September 28, 1998, HITN filed a petition for reconsideration of that grant.<sup>40</sup> On January 4, 1999, the Chief of the Division's Distribution Services Branch denied HITN's petition for reconsideration.<sup>41</sup> HITN filed a request for stay of the grant on February 3, 1999.<sup>42</sup> On February 18, 2000, Ball State certified that it had constructed the station.<sup>43</sup>

11. On November 14, 2003, the Division released the *Memorandum Opinion and Order* which (1) denied the Second Indianapolis Petition and Second Anderson Petition; (2) denied HITN's petition to deny Ball State's Kokomo application; and (3) dismissed HITN's request for stay of processing of Ball State's Anderson application. The Division held that HITN's Indianapolis Application was properly dismissed because HITN could not serve its proposed receive sites because of interference.<sup>44</sup> With respect to the Anderson Application, the Division noted that HITN may have been correct that its application should have been considered mutually exclusive with the Station WBX257 Major Change Application, but it declined to reinstate the Anderson Application because the grant of the Station WBX257 Major Change Application was a final action.<sup>45</sup> The Division also held that in light of its decision to affirm the dismissal of the Indianapolis Application and Anderson Application, HITN lacked standing to challenge the grant of Ball State's Kokomo application.<sup>46</sup> Finally, the Division concluded that HITN had not justified its request for stay of processing of Ball State's Anderson application.<sup>47</sup> HITN filed the instant AFR on December 15, 2003.<sup>48</sup>

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<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.*

<sup>39</sup> See Broadcast Actions, Report No. 44315, *Public Notice* (rel. Aug. 28, 1998).

<sup>40</sup> First Anderson Petition.

<sup>41</sup> See Letter from Clay Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Jose Luis Rodriguez, President, Hispanic Information and Telecommunications Network, Inc. (dated Jan. 4, 1999).

<sup>42</sup> See Stay Request. On February 12, 1999 and February 24, 1999, Ball State filed requests for extension of time to oppose the Stay Request. Ball State filed its opposition on March 3, 1999.

<sup>43</sup> Letter from Edward J. Tully, Director of System Development, to Magalie R. Salas, Secretary, Federal Communications Commission (filed Feb. 18, 2000).

<sup>44</sup> *Division Order*, 18 FCC Rcd at 23876-77 ¶¶ 11-14.

<sup>45</sup> *Id.*, 18 FCC Rcd at 23877-79 ¶¶ 15-18.

<sup>46</sup> *Id.*, 18 FCC Rcd at 23879 ¶¶ 19.

<sup>47</sup> *Id.*, 18 FCC Rcd at 23879 ¶¶ 20.

<sup>48</sup> On January 5, 2004, Ball State filed "Motion to Dismiss Application for Review and Application for Stay." Ball State contends that the AFR does not comply with the formatting requirements of Section 1.49 of the Commission's Rules. We agree with Ball State that the AFR does not comply with Section 1.49 because the summary exceeds two pages and the margins do not comply with the specifications in the rule. 47 C.F.R. § 1.49(a). While we admonish HITN for filing a non-compliant pleading, we do not believe the defects warrant dismissal of the AFR. See Warren C. Havens, *Memorandum Opinion and Order*, 17 FCC Rcd 17527, 17529 n.26 (2002).

12. On January 28, 2004, the Wireless Telecommunications Bureau's Broadband Division granted Ball State's Kokomo Application.<sup>49</sup> On March 5, 2004, HITN filed the Kokomo PFR seeking rescission or reconsideration of the grant.

### III. DISCUSSION

13. *Indianapolis Application.* HITN contends that nothing in the Commission's Rules required it to study its own receive sites for co-channel or adjacent channel interference.<sup>50</sup> It argues that it was improper to read the ITFS eligibility rule (Section 74.932 of the Commission's Rules) together with the interference rule (Section 74.903 of the Commission's Rules).<sup>51</sup> Finally, HITN argues that even if the rules require that it be able to serve its receive sites, HITN should be able to show that it will provide service by using filters, a different receive antenna, or digital modulation.<sup>52</sup>

14. We conclude that the Division properly analyzed the rules at issue. Section 74.932(a) of the Commission's Rules stated, in relevant part, that an ITFS license "will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization...."<sup>53</sup> An applicant who sought to establish its ITFS license eligibility by providing service to accredited institutional or governmental organizations "must submit documentation from proposed receive sites demonstrating that they will receive and use the applicant's educational usage."<sup>54</sup> If the receive sites are unable to receive an applicant's signal because of interference from another station, the applicant cannot demonstrate compliance with Section 74.932(a) because the receive site will not be able to receive and use the applicant's educational programming. HITN does not attempt to explain how it would be logical to allow an applicant to demonstrate its eligibility by obtaining a letter from an organization that could never receive the applicant's signal. Accordingly, we affirm that HITN was required to obtain a letter from an accredited organization that would actually be able to use or receive its proposed signal.<sup>55</sup>

15. We also reject HITN's argument that, pursuant to Section 74.903(b)(4) of the Commission's Rules, the receive sites can consent to the interference from other stations. As noted above, HITN's applications are defective because they do not comply with Section 74.932 of the Commission's Rules. The only relevance of Section 74.903(a) is that this section defines interference for the purpose of determining whether HITN's proposed receive sites can receive and use HITN's proposed signals. Section 74.903(b)(4) of the Commission's Rules only applies when a pre-existing licensee or applicant is willing to accept interference from an applicant. It would be totally inconsistent with the

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<sup>49</sup> Public notice of the grant was given on February 4, 2004. See Wireless Telecommunications Bureau Site-By-Site Action, *Public Notice*, Report No. 1734 (rel. Feb. 4, 2004).

<sup>50</sup> AFR at 9-11.

<sup>51</sup> *Id.* at 14-16.

<sup>52</sup> *Id.* at 12-13.

<sup>53</sup> 47 C.F.R. § 74.932(a).

<sup>54</sup> 47 C.F.R. § 74.932(a)(4). See, e.g., *Zion Lutheran School et al., Memorandum Opinion and Order*, 8 FCC Rcd 3606 ¶ 3 (1993) (stating that by failing to submit the appropriate letter of intended use, the applicant fails to demonstrate its qualifications and the application must be dismissed).

<sup>55</sup> See *Hispanic Information and Telecommunications Network, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 21450 (2004), *recon. pending*. HITN is correct that it was not initially required to make an affirmative engineering showing in its application that it would provide a useable signal to the receive sites. However, in light of the questions raised by the Petitioners, and our conclusion that HITN's own engineering study demonstrates that it cannot serve its proposed receive sites, HITN's application was defective and was properly dismissed.

underlying purposes of the eligibility criteria to allow HITN to become eligible when HITN would not be providing a useable signal to the organizations that formed the basis for HITN's eligibility. In any event, HITN never provided any such consent letters from the organizations at issue.

16. Finally, we reject HITN's attempt to rely on notch filters or different receive site antennas to show that there would not be interference to its proposed receive sites. We agree with the Division that Section 74.903(a) of the Commission's Rules states that interference shall be calculated using free space calculations (*i.e.*, without using filters);<sup>56</sup> thus, HITN's proposal is inconsistent with the plain language of the rule. Moreover, while HITN would have been free to propose a different receive site antenna, the staff properly evaluated the proposal actually offered by HITN.<sup>57</sup>

17. *Anderson Application.* We agree with HITN that the Station WBX257 Modification Application, which was filed after the Anderson Application, should have been considered mutually exclusive with the Anderson Application. While the Commission stated that applications such as HITN's would be deemed cut-off as of the first application filing window for new stations,<sup>58</sup> the Commission never indicated that later-filed major change applications should be processed without regard to the earlier filed applications for new stations.

18. Notwithstanding the error in granting the Station WBX257 Modification Application, we cannot reinstate HITN's application. As a practical matter, the Commission would be unable to grant the license for which HITN applied, because the Branch's decision to grant the Station WBX257 Modification Application is now a final action. More significantly, HITN lacks standing to contest the dismissal of its application because there is now no causal link between the actions that HITN proposes we undo (*i.e.*, grant of the Modification Application and dismissal of HITN's application) and the injury that HITN seeks to avoid (*i.e.*, loss of an opportunity to obtain the applied-for EBS license). As explained more fully below, if we reinstated the Modification Application, the law would nevertheless require the dismissal of HITN's application.

19. HITN could have brought the Branch's error to the Commission's attention by filing a petition for reconsideration of the grant of the Station WBX257 Modification Application.<sup>59</sup> Unfortunately, HITN did not do so. The grant of the Station WBX257 Modification Application therefore became a final action.

20. In the absence of a timely petition for reconsideration from HITN, the Commission may not independently revisit the grants of the Station WBX257 Modification Application on our own motion. We agree with the Division that revisiting the grant would be inconsistent with the Commission's

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<sup>56</sup> 47 C.F.R. § 74.903(a) ("Harmful interference will be considered present when the reference receiving antenna is oriented to receive the maximum desired signal, and a free space calculation determines that the desired to undesired signal ratio is less than the value specified for the respective channel under consideration").

<sup>57</sup> In light of our conclusion that HITN was not required to make a specific showing that its receive sites would receive a useable signal, we believe it was error for the Division to reject HITN's arguments on the grounds that HITN did not meet the standard for reconsideration. *MO&O*, 18 FCC Rcd at 23877 ¶ 13, *see* AFR at 11-12. We believe this error was harmless, however, because both the Division and the Commission have responded to the substance of HITN's argument.

<sup>58</sup> Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, *supra*, 8 FCC Rcd at 1277 ¶ 9.

<sup>59</sup> 47 C.F.R. § 1.106.

decision in *Steven S. Bosshard d/b/a Bosshard Radio Services*.<sup>60</sup> In that case, the Licensing and Technical Analysis Branch (Branch), Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, dismissed the subject application on the basis that it was inconsistent with a particular 47 C.F.R. Part 90 rule provision, and did not include a waiver request.<sup>61</sup> Bosshard then filed a request for reconsideration of the Branch's decision and requested a waiver of the relevant rule provision. Subsequently, the Branch granted him a waiver and reinstated his application for further processing.<sup>62</sup> Seven months later, however, the Branch denied Bosshard's reconsideration petition and waiver request, and dismissed the associated application.<sup>63</sup> The Commission held that because thirty days had passed between (a) the date when the Branch granted him a waiver and reinstated his application, and (b) the date when the Branch dismissed the application, Section 1.113(a) of the Commission's Rules had been violated.<sup>64</sup> Section 1.113(a) provides that a person, panel or board action pursuant to delegated authority has thirty days to modify or set aside its decision on its own motion.<sup>65</sup>

21. Similarly, in the instant case, if we were to revisit the grant of the Station WBX257 Modification Application, we believe such action would be inconsistent with Sections 1.113(a) and 1.117 of the Commission's Rules.<sup>66</sup> The AFR makes no mention of *Bosshard* and makes no attempt to distinguish HITN's situation from *Bosshard*. Instead, HITN repeats its arguments that it was not required to consider the modified facilities of Station WBX257 and that the former Mass Media Bureau erred in processing and granting the Station WBX257 Modification Application.<sup>67</sup> While we agree with HITN's contentions, the fact remains that the Station WBX257 Modification Application was granted, that HITN never protested that grant, and that the grant is a final action. We agree with the Division that *Bosshard* and Sections 1.113(a) and 1.117 of the Commission's Rules precludes us from revisiting that erroneous action.

22. HITN asserts that the Division could have reinstated HITN's application without revisiting the grant of the Station WBX257 Modification Application.<sup>68</sup> HITN, however, does not explain how the Division could ever have granted HITN's application for the specified spectrum in light of the finality of this Modification Application grant. HITN would have been unable to serve its proposed receive sites because of the modified facilities of Station WBX257. It therefore became ineligible to hold the license for which it applied once the Station WBX257 Modification Application was granted and became final. While it is unfortunate that the Station WBX257 Modification Application was erroneously granted before the Anderson application, we cannot revisit that grant. Under these circumstances, we affirm the dismissal of the Anderson Application.

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<sup>60</sup> *Steven S. Bosshard D/B/A Bosshard Radio Services, Memorandum Opinion and Order*, 14 FCC Rcd 20586 (1999).

<sup>61</sup> *Id.*, 14 FCC Rcd at 20588.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id. citing* 47 C.F.R. § 1.113(a).

<sup>65</sup> 47 C.F.R. § 1.113(a). In another case involving Section 1.113(a), the Commission held that the Branch is not authorized to rescind a decision regarding applications for station modification, after the Section 1.113(a) thirty-day period had elapsed. *See County of San Mateo, California, Order on Review and Reconsideration*, 16 FCC Rcd 4291 (2001).

<sup>66</sup> Section 1.117 of the Commission's Rules provides that the Commission has forty days from the date of public notice to review on its own motion action taken pursuant to delegated authority. 47 C.F.R. § 1.117.

<sup>67</sup> AFR at 17-21.

<sup>68</sup> *Id.* at 19.



23. Moreover, even if we were somehow able to overlook the fact that the grants had become final actions, we would still not reinstate HITN's application. In this proceeding, HITN has sought to have its application be considered mutually exclusive with the Station WBX257 Modification Application.<sup>69</sup> Recently, as part of a fundamental restructuring of the rules relating to MDS and ITFS, we dismissed all pending mutually exclusive ITFS applications.<sup>70</sup> If we reinstated HITN's application and returned the Station WBX257 Modification Application to pending status, we would immediately dismiss all the applications pursuant to our decision in the *BRS/EBS R&O & FNPRM*. In essence, HITN now lacks standing to challenge the grant of the Station WBX257 Major Change Application and the dismissal of its own application. In order to have standing, a petitioner must establish a causal link between the claimed injury and the challenged action by demonstrating that the injury can be traced to the challenged action and that the injury would be prevented or redressed by the relief requested.<sup>71</sup> At this point in time, returning the Station WBX257 Modification Application to pending status would not redress HITN's injury (*i.e.*, loss of the opportunity to obtain the applied-for license) because there is now another, independent basis for dismissing HITN's application.

24. *Ball State Applications.* In the AFR, HITN requests a stay of further processing of Ball State's Kokomo application.<sup>72</sup> We decline to consider this stay request because it does not comply with the Commission's Rules. Section 1.44(e) of the Commission's Rules states: "Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission." Since HITN improperly combined its stay request with its application for review, we will not consider its stay request.<sup>73</sup>

25. As noted above, subsequent to the filing of the AFR, Ball State's Kokomo application was granted, and HITN sought reconsideration of that grant.<sup>74</sup> We deny the Kokomo PFR. In light of our conclusion that we will not reverse the dismissal of HITN's Indianapolis and Anderson applications, we conclude that HITN lacks standing to challenge the grant of the Kokomo Application. To establish standing, a petitioner must make specific allegations of fact sufficient to demonstrate that grant of the subject application would cause the petitioner to suffer a direct injury.<sup>75</sup> Additionally, the petitioner must establish a causal link between the claimed injury and the challenged action by demonstrating that the injury can be traced to the challenged action and the injury would be prevented or redressed by the relief requested.<sup>76</sup> In this case, HITN cannot show that the grant of the Kokomo Application would cause it any injury because we have independently concluded that the Indianapolis and Anderson Applications will

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<sup>69</sup> AFR at 9.

<sup>70</sup> *MDS/ITFS R&O & FNPRM*, 19 FCC Rcd at 14264-65 at ¶¶ 261-263.

<sup>71</sup> *Americatel Corporation, Memorandum Opinion, Order, Authorization and Certificate*, 9 FCC Rcd 3993, 3995, ¶ 9 (1994).

<sup>72</sup> AFR at 24-25.

<sup>73</sup> See *Powell Meredith Communications Company, Memorandum Opinion and Order*, 19 FCC Rcd 12672, 12676 ¶ 9 (2004).

<sup>74</sup> Kokomo PFR.

<sup>75</sup> See *Alaska Native Wireless, LLC, Order*, 17 FCC Rcd 4231, 4235 (WTB 2002).

<sup>76</sup> *Id.*

not be reinstated. Accordingly, since the grant of the Kokomo Application would not cause any direct injury to HITN, we deny the Kokomo PFR.<sup>77</sup>

26. We also affirm the Division's denial of HITN's request for a stay of the grant of Ball State's application for a new ITFS station at Anderson, Indiana. HITN seeks a stay pending final action on its Anderson Application.<sup>78</sup> "To receive a stay of an administrative action, a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of a stay will not harm other interested parties, and 4) the grant would serve the public interest."<sup>79</sup> HITN's stay request was premised on its argument that its Anderson Application must be reinstated.<sup>80</sup> In light of our action affirming the dismissal of HITN's Anderson Application, we conclude that HITN has not shown a likelihood of prevailing on the merits. Moreover, since Ball State has constructed its Anderson facility, a stay would harm Ball State and its students by forcing the station off the air. Under these circumstances presented in this matter, we do not believe that a stay is warranted.

#### IV. CONCLUSION AND ORDERING CLAUSES

27. We deny HITN's application for review and petition for reconsideration of the grant of Ball State's Kokomo application. We decline to consider HITN's request for stay of further processing of the Ball State Kokomo application because it was not filed as a separate pleading.

28. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the application for review filed by Hispanic Information and Telecommunications Network, Inc. on December 15, 2003 IS DENIED.

29. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Hispanic Information and Telecommunications Network, Inc. on March 5, 2004 IS DENIED.

30. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 1.49 of the Commission's Rules, 47 C.F.R. § 1.49, that the Motion to Dismiss Application for Review and Application for Stay filed by Ball State University on January 5, 2004 IS DENIED.

#### FEDERAL COMMUNICATION COMMISSION

Marlene H. Dortch  
Secretary

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<sup>77</sup> In any event, we note that HITN's petition to deny did not allege that the Kokomo Application is defective in any way.

<sup>78</sup> Stay Request at 1.

<sup>79</sup> *Wireless Telco, Order*, 15 FCC Rcd 10223, 10225 ¶ 7 (WTB PSPWD 2000) (citing *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)).

<sup>80</sup> AFR at 23.